Supreme Court, U.S.
FILED
JAN 18 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-850

In the Supreme Court of the United States

OCTOBER TERM, 1988

BLINDER, ROBINSON & CO., INC.
AND MEYER BLINDER, PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

DANIEL L. GOELZER
General Counsel

PAUL GONSON
Solicitor

JACOB H. STILLMAN
Associate General Counsel

DENISE M. O'BRIEN
Deputy to the Associate General Counsel

THOMAS L. RIESENBERG
Senior Special Counsel

EVA MARIE CARNEY
RANDALL W. QUINN
KATHLEEN CODY
Attorneys
Securities and Exchange Commission
Washington, D.C. 20549

QUESTIONS PRESENTED

1. Whether the court of appeals, applying the standards articulated by this Court in *United States* v. *Swift & Co.*, 286 U.S. 106 (1932), correctly affirmed the district court's refusal to vacate a permanent injunction against petitioners' unlawful conduct.

2. Whether the district court was required to vacate the injunction on the ground, raised long after the entry of the final judgment, that the Securities and Exchange Commission's statutory authority to bring civil law enforcement actions interferes with the President's duties under Article II of the Constitution.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	5
Conclusion	16

TABLE OF AUTHORITIES

Cases:

Ben Sager Chemicals Int'l, Inc. v. *E. Targosz & Co.*, 560 F.2d 805 (7th Cir. 1977)	15
Blinder, Robinson & Co. v. *SEC*, 748 F.2d 1415 (10th Cir. 1984), cert. denied, 471 U.S. 1125 (1985)	3
Blinder, Robinson, Co. v. *Tom*, 226 Cal. Rept. 339 (1986), review denied (Cal. S. Ct., Sept. 28, 1988)	11
Blonder-Tongue Laboratories, Inc. v. *University of Illinois Found.*, 402 U.S. 313 (1971)	12
CFTC v. *Nahas*, 738 F.2d 487 (D.C. Cir. 1984)	14
Chicot County Drainage Dist. v. *Baxter State Bank*, 308 U.S. 371 (1940)	13
FTC v. *American Nat'l Cellular, Inc.*, 810 F.2d 1511 (9th Cir. 1987)	12
General Investment Co. v. *New York Central R.R.*, 271 U.S. 228 (1926)	13
Humphrey's Executor v. *United States*, 295 U.S. 602 (1935)	5
ICC v. *Chatsworth Coop. Mktg. Ass'n*, 347 F.2d 821 (7th Cir.), cert. denied, 382 U.S. 938 (1965)	12
Insurance Corp. of Ireland, Ltd. v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982)	13
Kalb v. *Feuerstein*, 308 U.S. 433 (1940)	14
Kansas City Southern Ry. v. *Great Lakes Carbon Corp.*, 624 F.2d 822 (8th Cir.), cert. denied, 449 U.S. 955 (1980)	14-15
King-Seeley Thermos Co. v. *Aladdin Indus., Inc.*, 418 F.2d 31 (2d Cir. 1969)	9
Lubben v. *Selective Serv. Sys.*, 453 F.2d 645 (1st Cir. 1972)	15

Cases—Continued: Page

McCandless v. *Furlaud*, 293 U.S. 67 (1934) 13
McLaughlin v. *United States*, 107 U.S. 526 (1882) 13
Morrison v. *Olson*, No. 87-1279 (June 29, 1988) 5
Nemaizer v. *Baker*, 793 F.2d 58 (2d Cir. 1986) 13-14
SEC v. *American Bd. of Trade, Inc.*, 751 F.2d 529 (2d Cir. 1984) 9
SEC v. *Blinder, Robinson & Co., Inc.*, 542 F. Supp. 468, (ID. Colo. 1982), aff'd, [1983-1984] Fed. Sec. L. Rep. (CCH) 99,491 (10th Cir. 1983), cert. denied, 469 U.S. 1108 (1985) 2
SEC v. *Warren*, 583 F.2d 115 (3d Cir. 1978) 9
Stewart v. *General Motors Corp.*, 756 F.2d 1285 (7th Cir. 1985) 8-9
Summers v. *Interstate Tractor & Equip. Co.*, 466 F.2d 42 (9th Cir. 1972) 13
Texlon Corp., In re, 596 F.2d 1092 (2d Cir. 1979) 15
Thompson v. *Tolmie*, 27 U.S. (2 Pet.) 157 (1829) 15
Tobin v. *Alma Mills*, 192 F.2d 133 (4th Cir. 1951), cert. denied, 343 U.S. 933 (1952) 9
United States v. *Chicago*, 663 F.2d 1354 (7th Cir. 1981) 8
United States v. *Swift & Co.*, 286 U.S. 106 (1932) 3, 4, 5, 7
United States v. *United Shoe Machinery Corp.*, 391 U.S. 244 (1968) 5, 7, 8
United States v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940) 14
Walling v. *Miller*, 138 F.2d 629 (8th Cir. 1943), cert. denied, 321 U.S. 784 (1944) 13
Wirtz v. *Graham Transfer & Storage Co.*, 322 F.2d 650 (5th Cir. 1963) 10

Constitution, statutes and rules:

U.S. Const. Art. II 11, 12
Securities Act, 15 U.S.C. 77v(a) 15
Securities Exchange Act, 15 U.S.C. 78a *et seq.*:
15 U.S.C. 78*o*(b)(4) 11
15 U.S.C. 78*o*(b)(6) 11
15 U.S.C. 78aa 15

Statutes – Continued: Page

Fed. R. Civ. P.:
Rule 9(a) 13
Rule 60(b) 3, 12, 14

Miscellaneous:

Restatement (Second) of Judgments (1982) 12, 14
7 J. Moore, *Moore's Federal Practice* (2d ed. 1987) 14
11 C. Wright & A. Miller, *Federal Practice & Procedure: Civil* (1973 & Supp. 1988) 14
5 C. Wright & A. Miller, *Federal Practice & Procedure: Civil* (1969 & Supp. 1987) 13

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-850

BLINDER, ROBINSON & CO., INC.
AND MEYER BLINDER, PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 855 F.2d 677. The rulings of the district court (Pet. App. 11a-23a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 1988. The petition for a writ of certiorari was filed on November 22, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners Blinder, Robinson & Co., Inc. (Blinder, Robinson), a registered securities broker-dealer, and Meyer Blinder, its president and principal shareholder, seek review of the decision of the court of appeals affirm-

ing the district court's denial of their 1986 request to vacate an injunction entered against them in 1982 at the request of respondent Securities and Exchange Commission (SEC or Commission).

1. In August 1980, the Commission filed a civil enforcement action against petitioners in the United States District Court for the District of Colorado. The complaint alleged federal securities law violations stemming from the 1979 underwriting of an initial public offering of common stock and warrants by American Leisure Corporation. After trial, the district court ruled that petitioners had violated the securities laws. Pet. App. 24a-51a.

The district court based its ruling on detailed factual findings. In particular, the court found that "the Blinder, Robinson sales force practiced a program of deliberately deceptive misinformation which [Meyer] Blinder orchestrated." Pet. App. 36a. The court also found that the firm fraudulently closed the all-or-none offering by using non-bona fide transactions to create the illusion that the entire offering had been sold (*id.* at 42a-45a) and that Meyer Blinder "knew that the closing * * * was a pretense" (*id.* at 39a). In addition, the court rejected Meyer Blinder's claim of good faith reliance on the advice of counsel and found that he had acted with intent to deceive, not merely with recklessness. *Ibid.*; see *id.* at 46a-48a.

Having found that petitioners violated the securities laws, the district court entered a final judgment that permanently enjoined petitioners from future violations of antifraud and anti-manipulation provisions of the federal securities laws. Pet. App. 48a-51a. The court of appeals affirmed that judgment, and this Court denied petitioners' petition for a writ of certiorari. See *SEC* v. *Blinder, Robinson & Co.*, 542 F. Supp. 468, 481-482 (D. Colo. 1982), aff'd, [1983-1984] Fed. Sec. L. Rep. (CCH) 99,491 (10th Cir. 1983), cert. denied, 469 U.S. 1108 (1985).

In 1984, petitioners filed their first motion to vacate the injunction under Rule 60(b) of the Federal Rules of Civil Procedure. They alleged that their counsel had acted incompetently in failing to object to the introduction of certain evidence at trial. The district court denied the motion, the court of appeals affirmed, and this Court denied certiorari. *Blinder, Robinson & Co.* v. *SEC*, 748 F.2d 1415, 1421 (10th Cir. 1984), cert. denied, 471 U.S. 1125 (1985). See Pet. App. 2a.

2. In 1986, petitioners filed a second motion to vacate the injunction, which is the subject of the present petition for a writ of certiorari. They there claimed that the injunction was causing them harm because, among other things, the Commission and various state authorities were using the injunction as a basis for imposing sanctions on them. They also asserted that changes in the organization and operation of Blinder, Robinson made the injunction no longer necessary. The district court rejected petitioners' request for relief. Pet. App. 18a-23a.

Evidently applying the test of *United States* v. *Swift & Co.*, 286 U.S. 106 (1932), the district court stated that the injunction had caused no "extreme and unexpected harm." Pet. App. 21a. In particular, the court pointed out that it had been well aware at the time it entered the injunction that the Commission had authority to take further actions based on the injunction and that it was well aware of the similar authority of state regulatory agencies. *Ibid.* The court added that it was the court's role to determine whether the public still "needs the protection" of the injunction and that it was "the responsibility of the regulatory agencies," subject to judicial review, to make their own determinations, in independent proceedings, whether other sanctions should be imposed. *Id.* at 21a-22a. With respect to petitioners' argument that changes in Blinder, Robinson rendered the injunction unnecessary, the court

found a continuing need for the injunction because Meyer Blinder remained in control of the firm. *Ibid.*

Petitioners sought reconsideration of the district court's denial of their second motion to vacate the injunction. For the first time, after almost six years of litigation, petitioners argued that the injunction should be vacated on the ground that the Commission lacked constitutional authority to bring the injunctive action in the first place and that the district court therefore lacked subject matter jurisdiction.[1] The district court denied petitioners' reconsideration request. Pet. App. 11a.

3. The court of appeals affirmed the district court's denial of petitioners' second motion to vacate the injunction. Pet. App. 1a-10a. The court of appeals concluded, first, that the district court had correctly adhered to the standards of *United States* v. *Swift & Co., supra,* in deciding whether to vacate the injunction and that such a decision lies in the discretion of the trial court. Pet. App. 4a-5a. The court of appeals next concluded that the district court had correctly found that petitioners had not shown "some substantial change in law or facts," such as would justify vacating the injunction. Pet. App. 5a. In particular, the collateral consequences of the injunction that petitioners invoked (state and federal regulatory actions) did not represent a change in fact because those consequences, far from being unforeseen, had been within the court's contemplation when it entered the injunction. *Ibid.* The court of appeals added that the district court did not err in declining to credit the evidence of rehabilitation, for

---

[1] In their second motion to vacate (at 67), petitioners had suggested, without argument, that there might be a question about the constitutionality of the Commission's civil law enforcement authority. In denying the motion, the district court did not address petitioners' suggestion.

Meyer Blinder's own affidavit supported the finding that Mr. Blinder, who remained in control of the firm, had not fully understood his firm's violations and his own fault. *Id.* at 5a-6a.

The court of appeals also rejected petitioners' constitutional claim. Pet. App. 7a-10a. Based on its reading of *Humphrey's Executor* v. *United States,* 295 U.S. 602 (1935), and *Morrison* v. *Olson,* No. 87-1279 (June 29, 1988), the court concluded that "the civil enforcement power given to the SEC is constitutionally valid." Pet. App. 10a. Noting that the President has the power to appoint SEC commissioners and to remove them for cause, and to choose the SEC chairman and to remove him at will, the court concluded: "these powers give the President sufficient control over the commissioners to insure the securities laws are faithfully executed and the removal restrictions do not impede the President's ability to perform his constitutional duty." *Ibid.*

ARGUMENT

1. Petitioners challenge (Pet. 7-16) the court of appeals' conclusion that, under *United States* v. *Swift & Co., supra,* the district court did not abuse its discretion in declining to vacate the 1982 permanent injunction prohibiting petitioners from engaging in certain unlawful conduct. They contend that this Court's decision in *United States* v. *United Shoe Machinery Corp.,* 391 U.S. 244 (1968), and decisions of other courts of appeals have applied a more flexible test than that prescribed by this Court in *Swift.* Pet. 7-11. They argue that the court of appeals should have considered whether certain collateral effects of the injunction were of "much greater significance" than originally anticipated and whether petitioners showed "a reduced need for the injunction because of rehabilitation

or other changed circumstances"; based on those assessments, petitioners suggest, the court of appeals should have determined whether "the balance of needs and equities suggests that the injunction be lifted." Pet. 14-15 (footnote omitted). Those contentions do not merit this Court's review.

a. The court of appeals read *Swift* to require "some substantial change in law or facts" before a party subject to an injunction may obtain relief from it. Pet. App. 5a. Acknowledging that a decision to vacate an injunction lies in the district court's discretion (*id.* at 4a), a point that petitioners do not dispute, the court of appeals affirmed the district court's rejection of petitioners' attempt to show that there had been a substantial change since the 1982 injunction was entered. First, the court agreed with the district court's finding that the collateral consequences incurred by petitioners—the various sanctions imposed by state and federal regulatory agencies—did not constitute a substantial change of fact because such consequences were contemplated when the injunction was issued. *Ibid.* Similarly, the court of appeals found amply supported the district court's finding that the need for the injunction had not changed either—that the injunction was still necessary because petitioners had not shown rehabilitation. *Id.* at 5a-6a. See *id.* at 21a, 22a (district court findings).[2]

[2] The district court stated that the issue before it was "first whether there is extreme and unexpected harm resulting from that continuing injunction as a permanent order and, second, whether there is really any need for it any more." Pet. App. 18a. With respect to the first issue, the court found that petitioners had not shown "consequences of which [the court] had no inclination [*sic*]," explaining that the court was "well aware" of the possible regulatory sanctions. *Id.* at 21a. With respect to the second inquiry, the court found that there was a need to continue the order. Thus, the court stated: "I'm saying in terms of looking to whether there is any continuing reason for the injunction, there is." *Ibid.* The court found: "what is at the bottom line, is

The concurrent factual findings on which the lower courts' decisions rest—that the collateral consequences were not unexpected and that the need for the injunction has not changed—are correct and, in any event, plainly do not merit this Court's review. Given those findings, the refusal to vacate the injunction was plainly correct as well. This Court held in *Swift* that, in order for a party subject to a permanent injunction to justify vacating the injunction, it must make "a clear showing of grievous wrong evoked by new and unforeseen conditions." 286 U.S. at 119. The *Swift* standard requires, at a minimum, that the moving party show a substantial change of circumstances. Here, not only did the court of appeals' opinion so characterize *Swift* (Pet. App. 5a), but both courts below found that petitioners failed to make such a showing. Moreover, *Swift* requires, at a minimum, that a party subject to an injunction show that the injunction is no longer necessary because its purposes have been fulfilled. 286 U.S. at 119. Here, the district court and court of appeals found that petitioners had failed in their attempt to make such a showing.

The court of appeals' decision is fully consistent with this Court's decision in *United Shoe*. The Court there affirmed that *Swift* "holds that [a decree] may *not* be changed in the interests of the defendants if the purposes of the litigation as incorporated in the decree * * * have not been fully achieved." 391 U.S. at 248. That formulation is in no way inconsistent with the "substantial change" approach taken by the court of appeals in the present case. Moreover, the lower courts in the present case both found that the purpose of the 1982 injunction—to ensure that

---

whether * * * I can say that the public no longer needs the protection of my order. And I can't say that, and because I can't say that, the motion [to vacate the injunction] is denied." *Id.* at 22a.

petitioners do not violate the securities laws—has not been fully achieved.[3]

The decision of the court of appeals is also consistent with all of the circuit court decisions that petitioners claim take a different approach from that of the Tenth Circuit here. See. Pet. 10-11. Every one of the decisions that approved the vacating of an injunction at the behest of the party subject to it did so only upon finding a substantial change of condition, as the court of appeals required here (Pet. App. 5a). Indeed, in every such decision, the court, unlike the court in this case, found that the purposes of the injunction had been fulfilled and hence that there was no further need for the injunction.[4] Accordingly, although

---

[3] The Court in *United Shoe* held the *Swift* standard inapplicable because, the Court explained, *United Shoe* involved a situation that was the "obverse" of the situation presented in *Swift*. 391 U.S. at 249. *Swift* involved a request by a party under an injunction for relief from the injunction. In *United Shoe*, by contrast, the government sought to amend a decree in order to exact more onerous obligations from the enjoined party in order to ensure that the decree would serve its intended purpose. 391 U.S. at 248-249. The *United Shoe* Court expressly relied on the distinction in holding that the *Swift* standard did not apply in the case before it because "[i]n *Swift*, the defendants sought relief not to achieve the purpose of the provisions of the decree, but to escape their impact." 391 U.S. at 249. In contrast, the Court held, the decree could be modified if the government proved that new circumstances made such modification necessary in order for the decree to achieve its original purpose of eliminating the violations. *Id.* at 249-252. Presumably the court of appeals in the present case had that seemingly more relaxed approach in mind when it stated that it would not apply the approach of *United Shoe*, which it characterized as permitting modification of an injunction if "the facts and circumstances prevailing at the time of the issuance of the injunction have changed or new ones have arisen." Pet. App. 4a. The present case, of course, is like *Swift* and not like *United Shoe*.

[4] In *United States* v. *Chicago*, 663 F.2d 1354, 1360 (7th Cir. 1981), the court considered new harm to *third parties* and found that the purposes of the injunction had been fulfilled. In *Stewart* v. *General*

there are minor differences in formulation in the various opinions, those differences do not affect the fundamental requirements of *Swift*, and they do not create a conflict with the decision of the court of appeals in the present case.

b. In any event, review of the court of appeals' decision would not be warranted as a means to consider petitioners' proposed balancing test. First, there is no support in *United Shoe* or *Swift* for a balancing test like that proposed by petitioners. Under the *United Shoe* description of *Swift*'s holding, as under *Swift* itself, an injunction may not be vacated at the behest of the party subject to it where the injunction's purposes have not been fulfilled; no balancing of collateral harms is called for in those cir-

---

Motors Corp., 756 F.2d 1285, 1293 (7th Cir. 1985), the court also found that the injunction had served its purpose. Similarly, in *SEC* v. *Warren*, 583 F.2d 115, 121 (3d Cir. 1978), the court found that the purpose of the injunction had been accomplished; the court also noted that the regulations that the defendant had allegedly violated had been amended after entry of the injunction. Finally, in *Tobin* v. *Alma Mills*, 192 F.2d 133, 136 (4th Cir. 1951), cert. denied, 343 U.S. 933 (1952), although the court did refer to the injunction's collateral consequences, the court found that there was no need to continue the injunction. The court of appeals there was also *affirming* the trial court's discretionary decision to vacate the injunction.

King-Seeley Thermos Co. v. *Aladdin Indus., Inc.*, 418 F.2d 31 (2d Cir. 1969), involved a situation much more like that in *United Shoe* than in *Swift*, because the case involved two innocent business competitors seeking to resolve a trademark dispute, so that the defendant who was seeking modification of the injunction could be "regarded as having obtained equitable relief in the decree of injunction quite as much as" the plaintiff. *Id.* at 35. In any event, the court emphasized the importance of changed circumstances and quoted the *United Shoe* formulation of *Swift*'s holding. *Ibid.* *SEC* v. *American Bd. of Trade, Inc.*, 751 F.2d 529 (2d Cir. 1984), is not relevant to and did not discuss the *Swift* issue because it involved a *preliminary* injunction rather than a final judgment.

cumstances. Nor do any of the court of appeals decisions cited by petitioners stand for the proposition that collateral consequences might outweigh a still-existing need for the injunction.

Petitioners' balancing test is not only unsupported by case law but is unjustifiable. Where there remains a need for an injunction (because there is a continuing threat of recurrence of illegal conduct), permitting defendants to escape from the injunction would mean that the enforcement agency would not have the deterrent force of contempt acting as a self-policing measure. That not only would diminish the effectiveness of an important statutory enforcement tool but would likely increase the burden on both the regulatory agencies and the courts. See *Wirtz* v. *Graham Transfer & Storage Co.*, 322 F.2d 650, 653 (5th Cir. 1963) (injunctions obtained by regulatory agency are "an essential part of the congressional scheme for making the [statute] work"). And it would be especially inappropriate to consider collateral consequences like the regulatory sanctions at issue here, which are expressly provided for by state and federal law, as grounds for vacating an injunction: weighing such sanctions would undermine the legislative judgments to make such sanctions available. The alleged harshness of the collateral consequences of an injunction such as the one here is properly dealt with in the independent proceeding in which the collateral sanctions are imposed or in an appeal from the decision imposing them. Investors should not be deprived of the needed protection afforded by an injunction under the federal securities laws simply because regulatory bodies are, as authorized by law, using the injunction in their disciplinary proceedings.

Finally, even if petitioners' balancing test were adopted, it would not aid them. Petitioners themselves do not propose that all collateral consequences of an injunction be weighed in favor of vacating it; they propose to weigh only

those consequences that are of "much greater significance" than originally anticipated. Pet. 14. How far that standard differs from the unforeseen-consequences standard actually applied by the lower courts petitioners do not say; but in any event, as the district court's finding confirms (Pet. App. 21a), the full extent of the possible regulatory sanctions was readily foreseeable, as such sanctions are clearly provided for by law. See, *e.g.*, 15 U.S.C. 78*o*(b)(4) and (6).[5] Similarly, although petitioners suggest that "a reduced need for the injunction because of rehabilitation or other changed circumstances" (Pet. 13) could weigh in favor of vacating an injunction, the lower courts found no such rehabilitation (Meyer Blinder, who had orchestrated the deliberately deceptive unlawful scheme, was still in charge of Blinder, Robinson and had not yet fully understood his fault); hence, there is no such reduced need in this case. In short, there would be nothing in this case to weigh in petitioners' favor in the balance that they propose.

2. Petitioners also challenge (Pet. 16-29) the court of appeals' conclusion that the Commission's civil enforcement authority does not interfere with the President's duties under Article II of the Constitution. Petitioners' contention does not merit review. No court has agreed with petitioners' view that the civil enforcement authority of the SEC or other independent agencies is unconstitu-

---

[5] In addition, petitioners have failed to show that the mere existence of the injunction caused the imposition of the collateral sanctions. At the federal level at least, sanctions may be imposed based on the underlying violation, even if the injunction is vacated; and any sanction must be judged "in the public interest." 15 U.S.C. 78*o*(b)(4) and (6). See also *Blinder, Robinson & Co.* v. *Tom*, 226 Cal. Rptr. 339, 341 (1986), review denied (Cal. Sup. Ct., Sept. 28, 1988).

tional,[6] and there is no reason why the issue demands this Court's consideration at this time. Moreover, wholly apart from the merits of the constitutional ruling, petitioners' claim of a constitutional infirmity in the SEC's enforcement authority is precluded by well-settled principles of finality.[7]

The Commission brought this action against petitioners in 1980. Petitioners contested the Commission's charges on the merits and pursued a direct appeal (ultimately to this Court) from the adverse final judgment. In 1984, they collaterally attacked the final judgment by filing a Rule 60(b) motion, and they pursued an appeal (ultimately to this Court) from the denial of that motion. It was not until their second Rule 60(b) motion – filed more than five years after the complaint issued and almost four years after entry of the original injunction – that petitioners for the first time raised the Article II issue.

Under basic principles of res judicata, petitioners were barred from attacking the final judgment embodying the 1982 injunction because they had had a full and fair opportunity to raise their constitutional claim in the proceeding leading to the judgment. See, *e.g.*, *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Found.*, 402 U.S. 313 (1971); Restatement (Second) of Judgments § 18, at 152 (1982); *id.* Intro. at 6 ("The principle underlying the rule of claim preclusion is that a party who once had a chance to litigate a claim before an appro-

---

[6] See, *e.g.*, *FTC* v. *American Nat'l Cellular, Inc.*, 810 F.2d 1511 (9th Cir. 1987); *ICC* v. *Chatsworth Coop. Mktg. Ass'n*, 347 F.2d 821, 822 (7th Cir.), cert. denied, 382 U.S. 938 (1965).

[7] Because petitioners' constitutional claim is clearly barred by res judicata, it is unnecessary to address the merits of the claim at this time. The Commission, which has consistently argued that its civil enforcement authority conforms to the requirements of Article II, believes that the court of appeals was correct in so holding.

priate tribunal usually ought not to have another chance to do so."). Although that rule admits certain exceptions, there is no exception for petitioners' claim. That claim might most naturally be viewed as a challenge to the Commission's legal capacity to bring a civil enforcement action. See, *e.g.*, *General Investment Co.* v. *New York Central R.R.*, 271 U.S. 228, 230-231 (1926); *Walling* v. *Miller*, 138 F.2d 629, 631-633 (8th Cir. 1943), cert. denied, 321 U.S. 784 (1944). A challenge to legal capacity is waived unless raised in the initial pleadings. See Fed. R. Civ. P. 9(a); *McCandless* v. *Furlaud*, 293 U.S. 67, 73-75 (1934); *McLaughlin* v. *United States*, 107 U.S. 526, 528 (1882); *Summers* v. *Interstate Tractor & Equip. Co.*, 466 F.2d 42, 49-50 (9th Cir. 1972). See generally 5 C. Wright & A. Miller, *Federal Practice & Procedure: Civil* § 1295, at 397 (1969 & Supp. 1987).

Even if petitioners' claim that the SEC lacked capacity to sue were viewed as having a bearing on the subject matter jurisdiction of the court that entered the final judgment, res judicata would still bar petitioners' collateral attack on the judgment. Where, as here, a final judgment has been entered in a contested case, it is generally not subject to subsequent challenge for lack of subject matter jurisdiction, even though the jurisdictional issue was never raised or decided. *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U.S. 371 (1940). In *Chicot County*, jurisdiction had been founded on a federal statute that was later declared unconstitutional. The Court held that the later holding of unconstitutionality would not operate retroactively to render the judgment void because such a retroactive effect would be contrary to "well-settled" principles of res judicata. *Id.* at 378.[8] None of the few, narrow ex-

[8] See also *Insurance Corp. of Ireland, Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.9 (1982); *Nemaizer* v. *Baker*, 793

ceptions to that rule applies in this case.[9]

No different conclusion is warranted because petitioners are subject to a continuing injunction and sought relief under Rule 60(b). "A judgment concluding an action is not deprived of finality for purpose of res judicata by reason of the fact that it grants or denies continuing relief * * *." Restatement (Second) of Judgments § 13, at 133 (1982) Comment C. A final judgment is not "void" under Rule 60(b) for lack of subject matter jurisdiction where the subject matter of the suit was within the court's competence and there was no usurpation of power by the court. See 7 J. Moore, *Moore's Federal Practice* ¶ 60-25[2], at 60-228 to 60-230 (2d ed. 1987) (footnotes omitted) ("except for the rare case where power is plainly usurped, if a court has the general power to adjudicate the issues in the class of suits to which the case belongs then its * * * final judgments, whether right or wrong, are not subject to collateral attack, so far as jurisdiction over the subject matter is concerned").[10] In this case, Congress has expressly given

---

F.2d 58, 65 (2d Cir. 1986); Restatement (Second) of Judgments § 12, at 120 ("Even if the issue of subject matter jurisdiction has not been raised and determined, the judgment after being final should ordinarily be treated as wholly valid if the controversy has been litigated in any other respect."); 11 C. Wright & A. Miller, *Federal Practice & Procedure: Civil* § 2862, at 197-201 (1973 & Supp. 1988).

[9] It may be possible to challenge subject matter jurisdiction after a judgment has become final where the judgment was rendered by default (see Restatement (Second) of Judgments § 12, at 115, 124-125 (1982); *CFTC* v. *Nahas*, 738 F.2d 487 (D.C. Cir. 1984)), or where a state court usurped another forum's power by exercising jurisdiction that is vested solely in the federal courts (see Restatement (Second) of Judgments § 12(2); *Kalb* v. *Feuerstein*, 308 U.S. 433, 439 (1940)), or where the government collaterally attacks a judgment on sovereign immunity grounds (see *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512-514 (1940)).

[10] See also *Kansas City Southern Ry.* v. *Great Lakes Carbon Corp.*, 624 F.2d 822, 825 (8th Cir.) (citations omitted) ("Absence of subject

district courts jurisdiction to adjudicate all suits "brought to enforce any liability or duty created by [the Securities Act and the Securities Exchange Act]" (15 U.S.C. 77v(a), 78aa), and that authority has been exercised in thousands of cases for more than 50 years. Clearly, the judgment of the district court in this case did not involve any usurpation of judicial power.[11]

Adhering to principles of finality is especially important in a case like the present. The consequences of petitioners' position, if accepted, would be dramatic. Presumably, all of the thousands of defendants in Commission enforcement actions who have been enjoined during the 54 years of the Commission's existence, as well as the numerous defendants who have been the subject of judgments in enforcement actions brought by other independent agencies, would be entitled to seek to have those judgments vacated. In these circumstances, petitioners' argument furnishes no ground for abandoning ordinary principles of finality.

---

matter jurisdiction may, in certain cases, render a judgment void. * * * However, this occurs only where there is a plain usurpation of power, when a court wrongfully extends its jurisdiction beyond the scope of its authority."), cert. denied, 449 U.S. 955 (1980); *In re Texlon Corp.*, 596 F.2d 1092, 1099-1100 (2d Cir. 1979); *Ben Sager Chemicals Int'l, Inc.* v. *E. Targosz & Co.*, 560 F.2d 805, 812 (7th Cir. 1977); *Lubben* v. *Selective Serv. Sys.*, 453 F.2d 645, 649 (1st Cir. 1972).

[11] Petitioners cite a single case (Pet. 29 n.44), *Thompson* v. *Tolmie*, 27 U.S. (2 Pet.) 157, 163 (1829), in support of their assertion that they were entitled to litigate the constitutional issue on the merits. *Thompson* offers petitioners no support. The Court there actually *rejected* a voidness challenge to a court's order even though the court lacked authority under the relevant statute to enter the order. The *Thompson* Court's dictum that "[i]f there be a total want of jurisdiction, the proceedings are void" (*id.* at 163) is consistent with the rule that only where there is a plain usurpation of power may a judgment be set aside on voidness grounds.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

DANIEL L. GOELZER
General Counsel

PAUL GONSON
Solicitor

JACOB H. STILLMAN
Associate General Counsel

DENISE M. O'BRIEN
Deputy to the Associate General Counsel

THOMAS L. RIESENBERG
Senior Special Counsel

EVA MARIE CARNEY
RANDALL W. QUINN
KATHLEEN CODY
Attorneys
Securities and Exchange Commission

JANUARY 1989

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989—241-699/00061